Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

4-MALI LLC, PETITIONER

v.

BANKERS INSURANCE CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Trial Court err in refusing to grant appellant, **4-MALI L.L.C.'s** Motion for Summary Judgment, finding insurance coverage for the removal and replacement of shelves necessary for the repair and replacement of a flood damaged floor located in their leased premises under the National Flood Insurance Program policy?

2. Did the Trial Court err in granting appellee, **Banker's Insurance Company's** Motion for Summary Judgment, finding that appellant, **4-MALI L.L.C.** did not submit a timely Proof of Loss Statement, when **Bankers** made an unconditional tender for other damages with knowledge that appellant intended to seek recovery of shelf moving expenses?

PARTIES TO THE PROCEEDING

Petitioner and Writ applicant, 4 MALI, L.L.C., is a Louisiana Limited Liability Company, domiciled in Rapides Parish, Louisiana.

Defendant, Bankers Insurance Company is an insurance company writing National Flood Insurance Program Policies in Louisiana, and nationwide. Bankers is represented by Mr. Gerald Nielson and Mr. John Carter of the Nielson Law Firm in Metairie, Louisiana.

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OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is unpublished. (See App. 16a) The judgement of the Western District of Louisiana District Court is also not published. (App. 1a) Rehearing was denied by the U. S. Fifth Circuit. (App. 20a)

JURISDICTION

United States Supreme Court Rule 10 provides that jurisdiction is proper in this case because a Federal Court of Appeal has decided an important issue which conflicts with other Federal Courts of Appeal and this Court's earlier Rulings concerning National Flood Insurance Program (hereinafter "NFIP") claims.

Despite Bankers Insurance Company (hereinafter "Bankers") accepting and paying two additional claims for flood damage made by 4-MALI, L.L.C. (hereinafter "4-MALI") after the sixty (60) day proof of loss period, Bankers denied payment of the shelf moving expense associated with the first timely filed proof of loss made by 4-MALI. For the first time in their Motion for Summary Judgement, filed December 30, 2002, Bankers raised the issue of 4-MALI filing a timely proof of loss in this case. The flood damage occurred on June 27, 2000, and 4-MALI General Partner, Eugene P. Cicardo, Jr. filed a sworn Proof of Loss Statement on August 1, 2000, which referenced the shelf moving expenses in question, and indicated that an estimate would be provided to Bankers upon receipt. Bankers first denied that coverage under the

NFIP existed for the shelf moving expenses. Then Bankers paid $166,978.19 to 4-MALI on August 9, 2000, towards the claim, excluding the shelf moving expenses. Finally, Bankers paid $58,539.87 on October 12, 2000, to 4-MALI, again omitting the shelf moving expenses from payment. For these reasons, which are documented in the Motion for Summary Judgement filed by 4-MALI, the opposition to Bankers' Summary Judgment, the Appeal of this matter to the United States Court of Appeal for the 5th Circuit, and Request for Rehearing, it is respectfully requested that this Honorable Court overturn the lower Courts' decision, and order Bankers to pay the shelf moving expenses incurred by 4-MALI as part of their Federal Flood Damage Claim.

RELEVANT PROVISIONS

Federal Rule of Civil Procedure Article 56(c) provides in pertinent part:

> The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.

STATEMENT

Course of proceedings and disposition in the Court below

4-MALI L.L.C. (hereinafter "**4-MALI**") plaintiff and appellant herein, is the Owner and Lessor of immovable property known as the Power Center, located on MacArthur Drive in Alexandria, Rapides Parish, Louisiana. **4-MALI** filed a complaint for Damages against defendants/appellees, **Bankers Insurance Company** (hereinafter "**Bankers**") for their denial of **4-MALI**'s first party insurance coverage claim under the National Flood Insurance Program (hereinafter "NFIP"). Certain Lessees of the Power Center including Hobby Lobby, Office Depot, and the Alexandria Furniture Outlet suffered flood damage as a result of a June 27, 2000, sudden torrential rainfall.

Bankers denied **4-MALI**'s attempts to recover the cost of shelf moving expenses totaling $101,185.46 for all three stores. **Bankers** first paid **4-MALI** a total of $166,978.19 on August 9, 2000, for the first claim, submitted by 4MALI General Partner, Eugene P. Cicardo, Jr. on August 1, 2000. **Bankers** paid **4-MALI** $58,539.37 on October 12, 2000, for additional damages submitted on the Partial Proof of Loss forms, related to the same flood claim. **4-MALI** filed a Complaint for Damages in the United States District Court, Western District of Louisiana, Alexandria Division, on June 27, 2001, to recover the $101,185.46 shelf moving expenses. **4-MALI** then filed a Motion for Summary Judgment on November 26, 2002, seeking to have the flood claim covered under the NFIP, and paid by **Bankers**. **Bankers** opposed **4-MALI**'s Summary Judgment, and

filed their own Motion for Summary Judgment on January 6, 2003, asserting for the first time that **4-MALI**'s claim for shelf moving expenses was both untimely and not submitted on the proper "Proof of Loss" form. The District Court, Honorable F.A. Little Jr., granted **Bankers'** Motion for Summary Judgment, holding that **4-MALI**'s shelf moving expenses were not covered by the SFIP and that they failed to comply with the policy's proof of loss form requirements. The Court dismissed **4-MALI**'s claims, with prejudice, at their cost. **4-MALI** then appealed the District Court's ruling to the United States Court of Appeal for the Fifth Circuit, submitting Briefs on June 3, 2003. The U.S. 5th Circuit first granted Oral Argument in the matter, set for December 3, 2003. Then the 5th Circuit decided on November 24, 2003, that Oral Argument was not necessary. The U.S. 5th Circuit then rendered their decision on December 11, 2003, affirming the Trial Court's grant of **Banker's** Motion for Summary Judgement. **4-MALI**'s Petition for Rehearing was denied by the 5th Circuit on January 14, 2004.

On the date of the flood, June 27, 2000, the lease between **4-MALI,** Lessor, and its Lessees, Office Depot, Hobby Lobby, and the Alexandria Furniture Outlet stores (hereinafter "Lessees") required **4-MALI** to repair whatever damage occurred to the leased premises. After examining the Lessees' flood damaged premises, **BANKERS'** Adjuster, David Babcock, prepared the first Partial Proof of Loss form, with a net damage claim of $166,978.19, omitting the cost of removal and resetting of the contents and shelving at the Lessees' stores. This omission was pointed out to the adjuster by **4-MALI** partner, John Rino, and the approved flood remediation company, Paul Davis

Restoration Company, made a separate independent estimate for the cost of shelf removal in the amount of $101,185.46. Mr. Dirk Foster, President of Paul Davis Restoration, Co., indicated that the removal and resetting of the contents at all three Lessees' premises was necessary for his company to repair the damaged flooring.

BANKERS made a partial payment to **4-MALI** in the amount of $166,978.19, by way of check issued on August 10, 2000, for Insurance Policy No. 17000767794702, and for Claim No. 100-0011537. **4-MALI** general partner, Eugene P. Cicardo, Jr., further confirmed on August 14, 2000, with Jim Aldridge, Adjuster in **BANKERS'** Catastrophe Division that the negotiation of the first tendered check in the amount of $166,978.19 would not prohibit **4-MALI** from claiming further expenses for shelving removal. Mr. Cicardo further indicated as follows:

> "Further, we are to consider this check as an unconditional tender with no strings attached. If this is not your understanding, please notify me immediately. If I have not heard from you by noon, August 15, 2000, I will assume everything in this letter is correct and then negotiate the check with no fear that this concludes our claim."

Correspondence sent to **BANKERS** from Mr. Rino, along with the first "Partial Proof of Loss" in August 2000 indicated in lines 4 through 9 as follows:

"The attached Proof of Loss was compiled by your Adjuster. Since receiving her report, we dispute several items. We have contacted an independent to give us an estimate of cost. We note that there was no allocation for dumpster or to remove & replace contents to get to the floor. Our preliminary estimates are:

A) 2.65 per sq. ft. floor R/R carpet.

B) 2.52 per sq. ft. floor R/R tile.

C) 1.37 per sq. ft. floor R/R base molding.

D) Remove & Reset contents.

1)	Office Depot	37,424.76
2)	Alexandria Furniture	1,386.10
3)	Hobby Lobby	62,374.60
4)	Dumpster/Debris Removal	3,572.25

Upon Receipt of the estimate, same will follow."

(R. p. 78 Exh. "3")

4-MALI submitted a "Second Partial Proof of Loss" in September 2000 in the amount of $58,539.37, paid by **BANKERS** and noted on that form as follows:

> "Have filed proof for the moving of displays and shelving to replace floor. This is not reflected in these totals."

BANKER'S General Property Policy issued through the NFIP does not indicate that the removal and resetting of contents is an excluded item under the terms of the policy.

SUMMARY OF ARGUMENT

ISSUE NUMBER ONE SUMMARY OF THE ARGUMENT

Bankers failed to meet their burden of proving that no genuine issue existed on both the issue of NFIP coverage and the alleged failure of **4-MALI** to submit a proper Proof of Loss form, when **Bankers** knew that the disputed shelf moving expenses allegedly required an additional sworn Proof of Loss Statement. **Bankers** never advised **4-MALI** of the further additional form requirement, and **Bankers'** Independent Adjuster estimated a loss amount based on the shelf moving expenses.

ISSUE NUMBER TWO SUMMARY OF THE ARGUMENT

Bankers' Motion for Summary Judgment was granted in error based on **4-MALI**'s alleged failure to submit a timely Proof of Loss Statement, when **Bankers** made an unconditional tender for other damages which had been submitted after the 60 day proof of loss period, with knowledge that **4-MALI** intended to seek recovery of shelf moving expenses

known by **Bankers** within 60 days of the flood.

REASONS FOR GRANTING THE WRIT

ISSUE NUMBER ONE: Did the Trial Court err in refusing to grant appellant, 4-MALI L.L.C.'s Motion for Summary Judgment, finding insurance coverage for the removal and replacement of shelves necessary for the repair and replacement of a flood damaged floor located in their leased premises under the National Flood Insurance Program Policy?

Summary Judgment Standard

Rule 56(c) of the **Federal Rules of Civil Procedure** provides that Summary Judgment "shall be rendered forthwith if the pleadings, depositions, Answers to Interrogatories, and Admissions on file, together with the Affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to Judgment as a matter of law." The party seeking Summary Judgment bears the initial burden of informing the Court of the basis for its Motion and identifying those portions of the pleadings, depositions, Answers to Interrogatories, Admissions on file, and Affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Colson v. Grohman, 174 F.3d 498, 506 (5TH Cir. 1999); Marshal v. East Carroll Parish Hosp. Serv. Dist., 134 F.3d 319, 321 (5TH Cir. 1998).*

In the Federal system, when the nonmoving party bears the burden of proof at Trial, there is no genuine issue of material fact if the nonmoving party

cannot come forward at the Summary Judgment stage with evidence of ***sufficient quantity and quality for a reasonable juror to find that the party can satisfy his substantive evidentiary burden***. *Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91. L. Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed.2d 202 (1986); Matsushita Electric Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)*

In construing Summary Judgments under **Federal Rule of Civil Procedure Article 56**, the United States Supreme Court held that Summary Judgment shall be granted where the evidence is such that it would require a Directed Verdict for the moving party. *See Anderson v. Liberty Lobby, Inc., supra.* The Court in *Anderson* went on to state that if a defendant in a run of the mill civil case moves for Summary Judgment or a Directed Verdict based on the lack of proof of a material fact, the Judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded Jury could return a verdict for the moving party on the evidence presented. The Court further opined that the mere existence of a scintilla of evidence favoring the non-moving party's position will be insufficient; that there must be evidence on which the Jury could reasonably find for the plaintiff. ***(Federal Rule of Civil Procedure Art. 56)***

A fact is ***material*** if it is essential to a non-moving party's cause of action under the applicable theory of recovery and without which that party could not prevail. Material facts are those that potentially

insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute.

This Court further stated that **Federal Rule of Civil Procedure**, **Article 56** does not require the moving party to negate the elements of the nonmoving party's case. Rather, **Federal Rule of Civil Procedure 56** mandates the entry of Summary Judgment, after adequate time for discovery and upon Motion against the party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof. *(See Little v. Liquid Air Corporation, 37 F.3d 1069 (5th Cir. 1994) and Fontenot v. Upjohn Company, 780 F.2d 1190 (5th Cir. 1986)).*

ANALYSIS OF THE NATIONAL FLOOD INSURANCE ACT OF 1968

Federal Law governs disputes over coverage arising under the NFIP. *(See West v. Harris, 573 F.2d 873, 880-881 (5TH Cir. 1978)).* However, Courts have held that Congress did not intend to abrogate standard insurance law principles when it enacted the NFIP. *Drewitt v. Aetna Case. & Sur. Ins., 539 F.2d 496, 498 (5TH Cir. 1976); West, 573 F.2d at p. 881; Atlas Pallet, Inc. v. Gallagher, 725 F.2d 131, 135 (1ST Cir. 1984); Nelson v. Becton, 929 F.2d 1287, 1292 (8TH Cir. 1991).* The standard principles of insurance law apply to such policies, and this Court has held that "the determination of the legal operation of the unambiguous language of [an insurance] contract is a function for the Court and not the Jury." *West v.*

Harris, 573 F.2d at p. 877, 881. The law is well settled that if the language of the policy is clear and unambiguous, it should be accorded its natural meaning. *Hanover Building Materials, Inc. v. Guiffrida, 748 F.2d 1011, 1013 (5TH Cir. 1984).*

In the case at bar, there is no specific exclusion in any portion of the **BANKERS** policy which excludes from coverage the cost of moving and resetting of contents in a flood damaged building. On the contrary, several policy provisions clearly indicate that shelving of lessee stores are "improvements" defined by Article 2 of the SFIP as follows:

> **"'Improvements' means fixtures, alterations, or additions comprising a part of the insured building."**

No portion of this definition indicates "owned" improvements are the only covered items.

Policy Section **"Article Four-Property Covered"** provides as follows:

> **"Coverage A-Building Property**
>
> This policy covers a **'building'** at the premises which is described in the application, and includes:
>
> 1) The entire building, for its real property elements, including, if owned in common by a Condominium Association, as named insured, all ***units*** within the ***building*** and the ***improvements*** within

the ***units.***"

No provision in **BANKERS** policy **Article 3-Losses Not Covered**; **Article 5-Special Provisions,** or **Article 6-Property Not Covered**, address "removal and resetting of contents" required for flood damage remediation purposes.

A simple analogy applies when a homeowner's residence floods and carpet is damaged. In order to replace the carpet, furniture would have to be moved. In this case, the furniture in question are rows of shelving located in the Lessees' stores. **BANKERS** accepted their Adjustor's estimate for floor and baseboard repair of the **4-MALI** premises because they paid $166,978.19 to **4-MALI** for replacement. **BANKERS'** claim that removal and resetting of Lessees' contents is not covered by the policy because it is not owned by the insured **4-MALI** is specious at best. No such exclusion is found in any provision of the **BANKERS** Policy. Based on correspondence dated January 11, 2001, Mr. Jim Aldridge, Claims Representative for Bankers Insurance Company, denied **4-MALI**'s claim based on a coverage opinion letter from the NFIP dated December 13, 2000. By that time the sixty day time period from the date of the flood, June 27, 2000, had run, and **4-MALI** could not file a timely Proof of Loss, according to the argument now advanced by **BANKERS**.

BANKERS had requested the opinion letter, and in a January 4, 2001, letter, Jim Aldridge "apologize[d]" to the members of **4-MALI** for their tardy response to the coverage question. In the opinion letter, Joseph Buzzelli, Claims Manager for the NFIP, stated that

"...the SFIP you issued will not pay to remove and reinstall them [shelves], even though that is necessary to make building repairs." It is clear that **BANKERS** has strained a policy interpretation to deny coverage, since no specific provision in the policy unambiguously excludes coverage. As the Court has held, standard principles of insurance law apply to the interpretation and coverage of NFIP policies, and when the language is clear and unambiguous, it should be accorded its natural meaning. In the case at bar, the removal and resetting of shelves in the Lessee stores is covered under the NFIP and **BANKERS** policy. **BANKERS** has never argued that the removal and resetting of shelves to make floor repairs is unnecessary.

As the Court is well aware, insurance policies must be strictly construed. In fact, it is well settled that if language in the policy is clear and unambiguous, it should be accorded its natural meaning, even in SFIP interpretation. *West v. Harris, 573 F.2d 873 (5TH Cir. 1978); Drewitt v. Aetna Casualty Insurety Insurance, 539 F.2d 496 (5TH Cir. 1976); Atlas Palette, Inc. v. Gallagher, 725 F. 2d 131 (1ST Cir. 1984); Nelson v. Becton, 925 F.2d 1287 (8TH Cir. 1991);* and *Hanover Building Materials, Inc. v. Guiffrida, 748 F.2d 1011 (5TH Cir. 1984).* As such, it is respectfully submitted that the claim for removal and resetting of shelving at its Lessees' premises should be covered under the NFIP, and that **BANKERS** ordered to pay **4-MALI**'s claim.

ISSUE NUMBER TWO: Did the Trial Court err in granting appellee, Banker's Insurance Company's Motion for Summary Judgment, finding that appellant, 4-MALI L.L.C. did not submit a timely Proof of Loss Statement, when Bankers made an unconditional tender for other damages with knowledge that appellant intended to seek recovery of shelf moving expenses?

Exhibits attached to **BANKERS'** Motion for Summary Judgment clearly indicates that **4-MALI** attached removal and resetting of content estimates to the timely filed 1st "Partial Proof of Loss". For **BANKERS** to now claim that a certified sworn Proof of Loss form was not timely submitted for this amount is absolutely contrary to the facts herein. The fact that **BANKERS** sought a coverage opinion from the NFIP Statistical Agent for the removal and resetting of contents defeats their argument that they were not put on notice of the claim. Surely this Honorable Court can recognize that a formal technicality should not act as a bar to an otherwise meritorious claim.

The issue of timely submission of documentation was confronted in the *S.A. Burns v. Federal Emergency Management Agency, 84 F. SUPP.2d 839 (S.D. Texas 2000)* case. Judge Kent held that the claimants in a Federal Flood claim had timely submitted bills, expenses, receipts and related documentation to the Federal Emergency Management Agency (hereinafter "FEMA"), and FEMA's Motion for Summary Judgment, based on an alleged failure to comply with the SFIP proof of loss provisions, was denied. The Court held that an issue of fact existed as to whether the insured had complied with the certified

Proof of Loss Statement requirements, and the Court "strongly urged" both parties to concentrate on the prompt resolution of the true controversy in the case, which was the plaintiff's damages. FEMA did not claim that the plaintiff's Proof of Loss was not timely filed or adequate, but claimed that the claimant failed to furnish "all bills, receipts and related documents" to FEMA within sixty (60) days of the date of loss, which the Court ruled had no merit.

BANKERS' refusal to pay **4-MALI**'s otherwise meritorious claim is the sole motivation for them to claim that a Certified Sworn Proof of Loss Statement was not prepared and submitted, when their own actions refute this claim. Only upon learning that **BANKERS** intended for the first time to rely on **4-MALI**'s failure to timely submit a proof of claim, in the opposition to **4-MALI**'s Motion for Summary Judgment filed in November 2002, did **4-MALI** seek an Article 8(D) Waiver from the Federal Insurance Administrator of the requirement that a certified Proof of Loss be submitted within sixty (60) days of the claim. Up to that point, **BANKERS** had solely rested its defense on the fact that there was allegedly no coverage for the removal and resetting of contents at **4-MALI**'s Lessees' premises. **4-MALI** attached the removal and resetting estimate to their original "1st Partial" Proof of Loss submitted in August 2000, and again referenced their pending claim in the "2nd Partial" Proof of Loss submitted in September 2000, (which was submitted after the running of the 60 day period and was paid by **BANKERS**). **4-MALI** had absolutely no reason to believe that **BANKERS** would rely on their alleged failure to timely submit a Proof of Claim until **BANKERS** filed their Opposition to **4-MALI**'s Motion

for Summary Judgment.

While **BANKERS** argues that an "estimate" is not a "Proof of Loss" Statement, no argument has been made that the estimates were not attached to both the "First Partial" and the "2nd Partial" Proofs of Loss submitted by **4-MALI**. Clearly, this material issue of fact alone is sufficient to defeat **BANKERS**' Motion for Summary Judgment.

CONCLUSION

BANKERS real argument is that there is no coverage for the removal and resetting of contents at **4-MALI**'s Lessees' premises. However, there is absolutely no provision in the SFIP that such expenses are not covered. In fact, several SFIP Articles indicate that the removal and resetting of shelving is covered. First, it must be made clear that the claim does not encompass damages to any items which are located on the shelves. In fact, the only expense associated with the removal and resetting is the labor involved in such removal and resetting. **BANKERS** cites Article 3 of the SFIP which allegedly indicates that there will be no coverage due to "any other economic loss".

In reading the entire NFIP, there is absolutely no provision which excludes reimbursement for the removal and resetting of contents when repairs need to be made to a flooring area. If the best that **BANKERS** can do is a throw away "any other economic loss" exclusion, then it is clear that the NFIP is vague and ambiguous, and that Summary Judgment should never have been granted **BANKERS** based on vague and ambiguous language.

BANKERS further attempts to exclude coverage based on the fact that the shelving and their contents were not owned by **4-MALI**. However, it is clear that **4-MALI** is not seeking reimbursement for any items damaged by the flood which were owned by its lessees, but simply seeks reimbursement of labor costs related to the removing and resetting of contents. This is clearly covered by the NFIP, and it is respectfully requested that the Summary Judgment granted on behalf of **BANKERS** be overturned, and that Summary Judgment on behalf of **4-MALI** should be granted.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

4-MALI	**Civil Action No. 01-1184**
-vs-	**SECTION "A" (JUDGE LITTLE)**
BANKERS INSURANCE COMPANY	

JUDGMENT

For Written Reasons set forth on this date, the Motion for Summary Judgment filed by defendant Bankers Insurance Company is GRANTED {Doc. No. 27}. The Motion for Summary Judgment filed by plaintiff 4-Mali, LLC is DENIED {Doc. No. 13}. In addition, plaintiff 4-Mali, LLC's claim against Bankers Insurance Company is DISMISSED WITH PREJUDICE. Each party to bear its own costs.

Alexandria, Louisiana
28 April 2003

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE
JUDGMENT ENTERED
April 28, 2003
Copy: Auzenne - Nielson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

4-MALI	**Civil Action No. 01-1184**
-vs-	**SECTION "A" (JUDGE LITTLE)**
BANKERS INSURANCE COMPANY	

MEMORANDUM

Plaintiff 4-Mali, LLC and defendant, Bankers Insurance Company, each have filed Motions for Summary Judgment in this matter concerning coverage under the National Flood Insurance Program. Each party opposes the other's Motion. The Motions have been consolidated for consideration. The defendant, Bankers Insurance Company's Motion for Summary Judgment is granted {Doc. No. 23}. The plaintiff 4-Mali, LLC's Motion for Summary Judgment is denied {Doc. No. 13}.

BACKGROUND

Plaintiff, 4-Mail, LLC ("4-MALI") owns a shopping center, known as the Power Center, in Alexandria, Louisiana. 4-Mali leases properties in the Power Center to Hobby Lobby, Office Depot, and the Alexandria Furniture Outlet ("Lessees). 4-Mali purchased a Standard Flood Insurance Policy (SFIP) from Bankers Insurance Company ("Bankers"). Bankers is a Write-Your-Own carrier participating in the United States Government's National Flood Insurance Program (NFIP). See 42 U.S.C., § 4001 et seq.

On or about 27 June 2000, the Lessees' properties were flooded and damaged. 4-Mali hired Paul Davis Restoration ("Restoration") to relocate shelves, described as "remove and reset contents" on Restoration's invoice, totaled $101,185.46 for the three stores. 4-Mali filed a claim for this amount from

Bankers.

Bankers denied 4-Mali's claim for relocating the shelves of the Lessees, stating that this cost was not covered by the SFIP policy. Bankers has paid 4-Mali $225,518.06 for other costs incurred from the flood damage.

In its Motion for Summary Judgment, 4-Mali asserts that the Bankers General Property Policy issued through the NFIP does not exclude the cost of removing and resetting the contents of the Lessees' stores. 4-Mali seeks payment of the $101,185.46 for relocating the shelves in the three stores.

Bankers likewise seeks Summary Judgment, stating that the SFIP must be strictly construed and does not cover the cost of relocating the Lessees' shelves. Bankers also contends that regardless of the SFIP's coverage, 4-Mali has failed to comply with procedural requirements and may not recover the cost

of relocating shelves.

STANDARD OF REVIEW

Summary Judgment may be granted to the moving party only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, when viewed in the light most favorable to the non-moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; **Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).** A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. **Anderson, 477 U.S. at 248.** In making this determination, a Court must draw all justifiable inferences in favor of the non-moving party. **Id. at 255.** Once the moving party has shown "that there is an absence of evidence to support the non-

moving party's case," the non-moving party must come forward with "specific facts" showing a genuine factual issue for trial. **Fed. R. Civ. P. 56;** Celotex Corp. v. Catrett, **477 U.S. 317, 325 (1986).** Conclusory denials, improbable inferences, and legalistic argumentation are not an adequate substitute for specific facts showing that there is a genuine issue for Trial. S.E.C. v. Recile, **10 F.3d 1093, 1097 (5th Cir. 1993).**

DISCUSSION

4-Mali argues there is an ambiguity in the Bankers policy regarding coverage for the cost of relocating shelves, a cost which, 4-Mali points out, was a prerequisite to completing other necessary, covered repairs. 4-Mali asserts there is no provision in the policy specifically excluding coverage for relocating shelves and finds several provisions in the policy that could include shelf-relocating costs. According to plaintiff, these costs could fall within provisions

covering Improvements or Building Property.

In addition to arguing that no provision in the SFIP includes the cost of relocating shelves, Bankers contends that 4-Mali did not submit a Proof of Loss Statement as required by the SFIP. Specifically, Article 8(O)(3) requires an insured to submit to the insurer a signed and sworn Proof of Loss within sixty days after a loss occurs. The Proof of Loss must include, *inter alia*, an explanation of how the loss occurred and set forth the insured's ownership interest in the damaged property.

4-Mali concedes in its Opposition Memorandum that an estimate for the cost of relocating shelves was submitted to Bankers on 1 August 2000. Plaintiff asserts the estimate put Bankers on notice that 4-Mali would seek reimbursement for this cost. 4-Mali also states it is seeking an Article 8(D) Waiver of the sixty-day Proof of Loss requirement from the Federal

Insurance Administration (FIA). There is no additional information regarding the status of this waiver application. The real issue, according to plaintiff, is whether the SFIP provides coverage for the cost of relocating shelves.

Bankers counters that the cost of relocating shelves is not covered because the SFIP Policy applies only to property owned by 4-Mali; the shelves are owned by the Lessees, who are not named insureds under the SFIP. According to defendant, the shelves should be treated as the goods of a bailee. The SFIP covers Building Property owned by an insured but explicitly precludes coverage for a bailee's goods. Bankers cites 4-Mali's failure to comply with the Proof of Loss requirements of Article 8(O)(3) as another basis for denying coverage for the shelf-relocation costs.

It is not clear from the terms of the SFIP that the cost of relocating the Lessees' shelves is a covered

expense. It is clear, however, that an insured must comply with the Proof of Loss requirements as set forth in Article 8(O)(3). Plaintiff states it provided Bankers with an estimate of the costs of shelf relocation, but this estimate is no substitute for an insured's obligation to provide a sign and sworn Proof of Loss. Giving notice of a loss and providing a Proof of Loss within the sixty-day time frame "are separate and distinct requirements of the policy." Gowland v. Aetna, 143 F.3d 951, 954 (5th Cir. 1998) The provisions of an insurance policy issued pursuant to a federal program must be strictly construed and enforced. Id. The failure to provide a Proof of Loss Statement as outlined in Article 8(O)(3) precludes coverage under the SFIP. See id. at 953-54.

Plaintiff's statement that it is seeking an FIA waiver of the sixty-day Proof of Loss requirement appears to be an admission that 4-Mali did not adhere to the Proof of Loss requirements set forth in Article

8(O)(3). Although there is no provision excluding coverage for shelf relocation, plaintiff can point to no provision that includes this expense as a covered cost. Furthermore, plaintiff provides no convincing reasons why shelf relocation should be included within policy provisions covering Improvements and Building Property.

CONCLUSION

Because the plaintiff has not shown that its claimed costs are covered by the SFIP and has not complied with the policy's Proof of Loss requirements, the defendant's Motion for Summary Judgment is granted. Each party shall bear its own costs.

Alexandria, Louisiana
28 April 2003

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE
COPY SENT
4/28/03
To: Auzenne / Nielson

UNTIED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE, III
Clerk
Tel. 504-310-7700
600 Camp Street
New Orleans, LA
70130

October 6, 2003

IMPORTANT NOTICE

TO ALL COUNSEL LISTED BELOW

No. 03-30460 4-MALI v. Bankers Insurance Co
Projected Week of Hearing **12/01/03**

Dear Counsel:

We have tentatively scheduled this case for oral argument during the week shown.

If you have a serious, irresolvable conflict, contact us **IMMEDIATELY**. Do not ask to reschedule argument unless you can find no other solution. **GENERALLY, ENGAGEMENT OF COUNSEL IN ANOTHER COURT IS NOT AN "IRRESOLVABLE CONFLICT."**

So we can provide all pertinent information to the court before argument, and barring an emergency, we must receive all additional filings by noon on the workday immediately preceding argument.

If you are arguing before the Fifth Circuit for the first time, please visit our Internet site at "http:www.ca5.uscourts.gov/documents/handout.htm" for "Preparing for Oral Argument in the Fifth Circuit" and at "http:www.ca5.uscourts.gov/documents/ltsig-e.htm" for "Notice to Counsel Attending Oral Argument". If you do not have Internet access, please call and we will send you the information.

Counsel are advised it is almost invariably more helpful, in lieu of large exhibits, to furnish the courtroom deputy four smaller sized (not larger than about 8x14 inches) copies of charts, diagrams, etc., for the judges' use. If counsel believe it necessary to use large exhibits, please also furnish the small copies.

CALENDERING DEPARTMENT
504-310-7804

/gam

Mr. Stacy C. Auzenne
Mr. Gerald Joseph Nielson

PROJ-WK

UNTIED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE, III
Clerk
Tel. 504-310-7700
600 Camp Street
New Orleans, LA
70130

November 24, 2003

IMPORTANT NOTICE

TO ALL COUNSEL OF RECORD
No. 03-30460 4-MALI v. Bankers Insurance Co

Dear Counsel:

The panel to whom the above referenced case was assigned has determined under FRAP 34(a) that oral argument will not be required in this case. Therefore, counsel need not appear for argument on Wednesday, December 3, 2003.

The case will be decided in due course on the record and briefs on file.

Please acknowledge receipt on the attached copy of this letter.

Very truly yours,
CHARLES R. FULBRUGE, III,
Clerk
By: _____
Valerie L. Bellanger
Assistant Calender Clerk/
Courtroom Deputy

session #18
Mr. Stacy Auzenne
Mr. John Nielson

United States Court of Appeals
Fifth Circuit
FILED
December 11, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-030460

4-MALI L.L.C.,
Plaintiff-Appellant,

versus

BANKERS INSURANCE COMPANY
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 01-CV-1184

Before GARWOOD, JOLLY and CLEMENT, Circuit Judges.

PER CURIAM:

4-Mali L.L.C. ("4-Mali") appeals the District Court's Judgment dismissing its complaint claiming flood insurance coverage. The District Court held that 4-Mali's claims were not covered by a Standard Flood Insurance Policy ("SFIP"), and that, in any event, 4-Mali had failed to comply with the SFIP's procedural requirements. We hold that the District Court did not

err in finding that 4-Mali's failure to provide a Proof of Loss Statement within sixty days of the flood precludes coverage. See Gowland v.Aetna, 143 F.3d 351, 953-54 (5th Cir. 1998). As such, we need not evaluate the scope of the SFIP's coverage. The Judgment of the District Court is therefore

AFFIRMED.

Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

UNTIED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE, III
Clerk
Tel. 504-310-7700
600 Camp Street
New Orleans, LA
70130

November 24, 2003

IMPORTANT NOTICE

MEMORANDUM TO COUNSEL OF PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 03-30460 4-MALI v. Bankers Insurance Co
USDC No. 01-CV-1184

Enclosed is a copy of the Court's decision. The Court has entered Judgment under FED. R. App. P. 36. (However the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5th CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates. **5th CIR. RULES 35 and 40 require you to attach to your Petition for Panel Rehearing or Rehearing En Banc an unmarked copy of the Court's opinion or Order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5th CIR. R. 35 for a discussion of when a rehearing may

be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious Petition for Rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a Motion for a Stay of Mandate under FED. R. APP. P. 41 will not be granted simply upon request. The Petition must set forth good cause for a Stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise,, this Court may deny the Motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the District Court and/or on Appeal, and are considering filing a Petition for certiorari in the United States Supreme Court, you do not need to file a Motion for Stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The Judgment entered provides that appellant pay to appellee the costs on Appeal.

Sincerely,

CHARLES R GULBRUGE, III, Clerk

By: _____ _____
Rhonda Flowers, Deputy Clerk

Enclosure
Mr. Stacy C. Auzenne
Mr. Gerald Joseph Nielson
Mr. John Dennis Carter

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-030460

4-MALI L.L.C.,
Plaintiff-Appellant,

v.

BANKERS INSURANCE COMPANY
Defendant-Appellant

Appeal from the United States District Court for the Western District of Louisiana, Alexandria

---

ON PETITION FOR REHEARING

Before GARWOOD, JOLLY and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petition for

Rehearing is **DENIED**

ENTERED FOR THE COURT:

United States Circuit Judge
January 14, 2004

REHG-2

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702
Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

June 14, 2000
TELECOPIER COVER LETTER

TIME:	**5 PM**	**DATE:**	**8-14-00**
TO:	**Jim Aldridge**	**Fax Number: 727-738 1460**	
FROM: Gene Cicardo, Jr. Attorney at Law		**RE:** Power Center	
We are sending 4 pages		Original to Follow Via U. S. Mail _____ yes ___x____ No	

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL 318-445-2097 AS SOON AS POSSIBLE. FAX NUMBER 318-448-1902.

* *

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* *

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702

Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

August 14, 2000

Mr. Jim Aldridge
Catastrophe Division
P. O. Box 33061
St. Petersburg, FL 33733-8064

VIA FACSIMILE
727-738-1460

RE: 4-Mali, LLC and Power Center, 1804 MacArthur Drive, Alexandria, Louisiana

Dear Mr. Aldridge:

Enclosed please find a copy of letter we have sent to our adjustor regarding this claim. Further, this will confirm our conversation and the letter I received from you by fax allowing us to negotiate the check sent to us with no prejudice. This means that our negotiation of this check will not prohibit us from claiming any further expenses which, as you can see, we have done.

Further, we are to consider this check as an unconditional tender with no strings attached. If this is not your understanding, please notify me immediately. If I have not heard from you by noon, August 15, 2000, I will assume everything in this letter is correct and then negotiate the check with no fear that this concludes our claim.

Thanking you for your courtesies in this matter, I am

Yours very truly,
Eugene P. Cicardo, Jr.

EPCjr/dq
Enclosure

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702

Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

June 14, 2000

TELECOPIER COVER LETTER

TIME: 4:55 PM	**DATE: 8-14-00**
TO: Lisa Babcock	**Fax Number: 504-649-3229**
FROM: Gene Cicardo, Jr. Attorney at Law	**RE:** Power Center
We are sending 14 pages	Original to Follow Via U. S. Mail _____ yes ___x____ No

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL 318-445-2097 AS SOON AS POSSIBLE. FAX NUMBER 318-448-1902.

* *

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****

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702
Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

August 14, 2000

Liz Babcock
Adjustor
Banker's Insurance Company

VIA FACSIMILE
504-649-3229

RE: 4-Mali, LLC and Power Center, 1804 MacArthur Drive, Alexandria, Louisiana

Dear Lori:

Pursuant to our various conversations, enclosed please find the estimate for the tile, based and drywall from Paul Davis Restoration.

Our main contention of differences are as follows:

1. Price per sq. ft. for/or carpet ($2.65); tile ($2.52); & base molding ($1.37)

2. In your estimate of the main area of Office Depot, you show 12,465 sq. ft. of vinyl tile flooring. According to our estimate, the main floor area is 17,103 sq. ft.

3. In the main floor area of Office Depot, the carpet turns up the wall which is connected to the carpet on the floor. This was left out of you estimate.

4. You failed to include debris removal/dumpster in your estimate.

5. Basically, we have no problem with your depreciation expense charged to us; however, we do object to any depreciation be

taken for Alexandria Furniture. As we discussed, Alexandria Furniture. As we discussed, Alexandria Furniture was completed and opened for business on January 15, 2000. This construction is brand new construction. We feel that no depreciation had accrued in the short time between when it was completed and this flood.

Our final contention is that to remove and replace the tile needed, we have to move the shelving and contents in the various stores. As you are aware, none of the contents were damaged and we are not claiming any damage for contents. However, we are claiming that in order to remove and replace the tile that was damaged, as you can see from our estimate, will cost us almost $100,000.

We feel that this is not a contents claim and that it goes into the costs of removing and replacing the flooring which was damaged; otherwise, our tenants would have claims against us for loss of business which

would far exceed the sums requested.

If you have any questions or car to discuss any of the details in this letter, please do not hesitate to contact me.

Thanking you in advance for your courtesies, I am

Yours very truly,

Eugene P. Cicardo, Jr.

EPCjr/dq

cc: Mr. Jim Aldridge

BANKERS
INSURANCE GROUP

BANKERS INSURANCE COMPANY
P.O. Box 33061 St. Petersburg, FL 33733-8061

January 4, 2001

4-MALI, LLC
PO BOX 12446
ALEXANDRIA, LA 71315-2446

RE:	Insured:	4-MALI, LLC
	Claim#	BI 1-00-11537
	Policy#	17-0007677947
	Date of Loss:	6-27-00

Dear Sirs:

I do apologize about the delay in getting these letters to you. I hope this resolves your question about the shelving.

If you care to discuss this, please give me a call at 1-800-725-9472, extension 3028.

Very truly yours,

Jim Aldridge
Claim Representative

Enclosures
Letter to NFIP
Response from NFIP

JA/pj

P. O. Box 33061/St. Petersburg, FL 33733-8061
Policy Information 727-823-4000/1-800-627-0000
Claims 727-894-3565/1-800-765-9700

NATIONAL FLOOD INSURANCE PROGRAM
BUREAU AND STATISTICAL AGENT

December 13, 2000

Bankers Insurance Company
Attn: Jim Aldridge, Claim Representative
P. O. Box 33061
St. Petersburg, FL 33733-8061

In Re:	Insured:	4-MALI, LLC
	Claim#	BI 1-00-11537
	Date of Loss:	6-27-00
	Policy#	17-0007677947

Dear Mr. Aldridge:

After reviewing your letter, and speaking with you, I have to agree with your assessment of coverage under the Standard Flood Insurance Policy (SFIP).

Because you insure the building and because the shelves are not permanently installed or owned by your insured, the SFIP you issued will not pay to remove and reinstall them, even though that is necessary to make building repairs. If the tenants have coverage, the cost would be acceptable under their tenant's policy.

I hope this clarifies the coverage question you are having with this claim. If you need additional information please let me know.

Thank you:

Joseph Buzzelli, Claim Manager
NFIP Bureau & Statistical Agent

**7700 Hubble Drive - Lanham, MND 20706 *
(301) 731-5300**

COMPUTER SCIENCES CORPORATION, under contract to the FEDERAL EMERGENCY MANAGEMENT AGENCY, is the Bureau and Statistical Agent for the National Flood Insurance Program

BANKERS
INSURANCE GROUP

BANKERS INSURANCE COMPANY

P.O. Box 33061 St. Petersburg, FL 33733-8061
November 27, 2000
NATIONAL FLOOD INSURANCE PROGRAM
ATTN: DON WATERS
7700 HUBBLE DRIVE **DROP FILE**
LANHAM, MD 20706

In Re:	Insured:	4-MALI, LLC
	Claim#	BI 1-00-11537
	Date of Loss:	6-27-00
	Policy#	17-0007677947

Dear Mr. Walters:

I had previously written to the National Flood Insurance Program offices about this loss and have not received a response. The insured is calling and I need to provide them with a response. I have already declined the coverage, but they wanted a confirmation from you that I am right or wrong.

The insured is a mall and there are several rented spaces with floor shelving that will need to be moved to have access to the floors so that the floor tile can be replaced.

Since the insured does not own these shelves, I do not see how we can pay for them under the building policy (general policy). The tenant policy might pay to move them, if they were damaged by the flood. This could come under the building improvement and alterations.

These are portable shelves that would go with the tenant when they leave.

Thank you for your assistance. I will look forward to your reply.

Very truly yours,
Jim Aldridge
Claim Representative
JA/PJ
cc: 4-Mali LLC

(2)

MAY 17 2004
OFFICE OF THE CLERK

No. 03-1429

IN THE

Supreme Court of the United States

4-MALI, L.L.C.,

Petitioner,

v.

BANKERS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

GERALD J. NIELSEN
Counsel of Record
JOHN D. CARTER
NIELSEN LAW FIRM, LLC
3838 North Causeway Blvd.
Suite 2850
Metairie, Louisiana 70002
(504) 837-2500

Attorneys for Respondent

187505

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the trial court err in refusing to grant Appellant 4-Mali, LLC's Motion for summary judgment, finding insurance coverage for removal and replacement of shelves necessary for the repair and replacement of a flood-damaged floor located in their leased premises under the National Flood Insurance Program policy?

2. Did the trial court err in granting Appellee Bankers Insurance Company's Motion for summary judgment, finding that Appellant 4-Mali, LLC did not submit a timely proof of loss statement, when Bankers made an unconditional tender for other damages with knowledge that Appellant intended to seek recovery of shelf-moving expenses?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Bankers Insurance Company is wholly owned by Bankers Insurance Group, which is a privately held company.

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42 Fed. Reg. 25701	11
43 Fed. Reg. 41943	12
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INTRODUCTION

This lawsuit arose over Bankers Insurance Company's ("Bankers") decision not to pay 4-Mali, LLC ("4-Mali") additional federal benefits for a flood claim presented under a Standard Flood Insurance Policy ("SFIP"), which is a codified federal regulation found at 44 C.F.R. Pt. 61, App. A(2) (1999 edition). As more fully discussed herein, this claim falls within the National Flood Insurance Program ("NFIP"), which was created by the National Flood Insurance Act of 1968, as amended (42 U.S.C. § 4001, *et seq.*).

Bankers is a Write-Your-Own ("WYO") NFIP carrier authorized to issue the federal government's SFIP pursuant to its "Arrangement" with the Federal Emergency Management Agency ("FEMA"). Although the Arrangement, codified at 44 C.F.R. Pt. 62, App. A, authorizes Bankers to issue the SFIP under its own logo, Bankers cannot alter, amend, or waive any of the terms or provisions of the SFIP. *See* 44 C.F.R. § 61.13(d) and 44 C.F.R. Pt. 61, App. A(2), Art. 8(D). The structure of the NFIP is such that only FEMA can make regulatory decisions regarding NFIP claims (42 U.S.C. § 4019), and only the federal courts may adjudicate those claims (42 U.S.C. § 4072). The reason for this is that U.S. Treasury funds are used directly (not through a reimbursement mechanism) to pay both the claims and the adjustment of the claims. 42 U.S.C. § 4017(d); *see also* 44 C.F.R. Pt. 62, App. A, Art. II and III. Because U.S. Treasury funds are used to pay flood claims, presentment and payment of flood claims must be in strict compliance with the terms of the SFIP and the requirements of the NFIP. Otherwise, such claim payments would be in a manner not sanctioned by the U.S. Congress and a violation of the Appropriations Clause of the U.S. Constitution. U.S. Const. Art. I, § 9, cl. 7. It is within this context that Bankers chose to not pay 4-Mali additional federal benefits.

At the outset, Bankers advises the Court that Petitioner has presented its questions for review contrary to their proper sequence. Conditions precedent for presentment of a flood claim should be addressed first, *i.e.*, whether 4-Mali submitted a signed and sworn proof of loss statement for the damages claimed. However, Petitioner frames this issue second as to whether the trial court erred in granting Bankers' motion for summary judgment finding that 4-Mali did not submit a timely proof of loss statement. If an insured fails to properly present a flood claim, then coverage never becomes an issue. This is the exact point made by the U.S. Fifth Circuit's *per curiam* decision affirming Bankers' motion for summary judgment, and it held that "4-Mali's failure to provide a proof of loss statement within 60 days of the flood precludes coverage. *See Gowland v. Aetna*, 143 F.3d 351, 353-54 (5th Cir. 1998). As such, we need not evaluate the scope of the SFIP's coverage." (Petition for Writ, Appendix 16a)

If an insured has met the conditions precedent for presenting its flood claim, which are set forth at 44 C.F.R. Pt. 61, App. A(2), Art. 8(O), then the scope of coverage may be at issue. Yet, as stated by the U.S. Fifth Circuit, there is no need to evaluate the scope of coverage if the insured has not preserved the claim with a proper, timely, signed and sworn proof of loss statement. Despite the U.S. Fifth Circuit's holding, Petitioner initially frames the coverage issue for this Court's review. This issue being whether the trial court erred in denying 4-Mali's motion for summary judgment for insurance coverage for the removal and resetting of the lessees' shelves and contents in order to effect repairs to the insured building's floor.

In the case at bar, it is without dispute that 4-Mali failed to provide a proof of loss statement for the cost of removing and resetting the shelving and contents within the insured building. As more fully discussed below, Petitioner loosely mixes the concepts of "notice," "proof of loss statement," and "documentation" in such a manner as to create confusion as to the real issue, that is whether the insured submitted a proof of loss statement within 60 days of the flood loss. Clearly, 4-Mali did not. Moreover, seven of the appellate circuits have unanimously held that failure to submit a signed and sworn proof of loss statement within 60 days of the flood loss is a bar to recovery. The appellate courts' decisions have been based upon this Court's holdings and guidance regarding federal programs that are underwritten with U.S. Treasury funds in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); and *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). For these reasons, this Court should deny 4-Mali's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Factual Background

On June 27, 2000, a sudden rainfall caused a flooding event on MacArthur Drive in Alexandria, Rapides Parish, Louisiana. Located on MacArthur Drive was the immovable property known as the Power Center. The Power Center was owned by 4-Mali. 4-Mali, as owner of the immovable property, had leased the premises to tenants, namely Hobby Lobby, Office Depot, and the Alexandria Furniture Outlet.

On that date, the building structure was insured by a Standard Flood Insurance Policy (44 C.F.R. Pt. 61, App. A(2)

(1999 edition)), issued by Bankers in its capacity as a WYO NFIP carrier. Said SFIP had coverage limits of $474,800, subject to a $5,000 deductible. 4-Mali timely notified Bankers of a potential flood loss to the insured premises.

In response to this notification, Bankers dispatched David Babcock, an independent adjuster, to assist 4-Mali in presenting its flood claim to the WYO carrier. Mr. Babcock met with the insured and prepared a proof of loss form with the net damage claim of $166,978.19, "omitting the cost of removal and resetting of the contents and shelving at the lessees' stores." (Petition for Writ, p. 4) Based upon this proof of loss statement, Bankers tendered payment to 4-Mali in the amount of $166,978.19 on August 10, 2000. (Petition for Writ, p. 5)

Bankers continued to investigate the flood loss and determined that an additional $58,539.37 was due under the SFIP. (Petition for Writ, p. 6) 4-Mali submitted a second proof of loss statement for these damages. (*Id.*) In return, Bankers tendered payment of $58,539.37 for these damages. Notably, neither proof of loss statement contained the cost of removing and resetting the shelving and contents owned by the lessees.

Nonetheless, and in an effort to assist 4-Mali, Bankers contacted the NFIP Bureau and Statistical Agent claims manager, Joseph Buzzelli, for an interpretation of whether coverage should be afforded for the cost of removing and resetting the lessees' shelving and contents. By letter dated December 13, 2000, Mr. Buzzelli advised Bankers of the following:

> Because you insure the building and because the shelves are not permanently installed or owned by your insured, the SFIP you issued will not pay

> to remove and reinstall them, even though that it is necessary to make building repairs. If the tenants have coverage, the cost would be acceptable under their tenant's policy.

(Petition for Writ, App. 32a) Therefore, even if Petitioner had submitted a signed and sworn proof of loss statement for these damages, Bankers could not pay for these damages as the NFIP Bureau and Statistical Agent had determined that coverage is not afforded. Ironically, due to the structure of the NFIP, Bankers would have received a 3.3 percent commission on the payment of such claim. *See* 44 C.F.R. Pt. 62, App. A, Arts. III(C) and (D). Thus, Bankers had no incentive whatsoever to deny the claim other than it did not fit within the parameters of the NFIP.

Course of the Proceedings and Disposition of the Court Below

On June 27, 2001, 4-Mali filed a Complaint for damages against Bankers in the United States District Court for the Western District of Louisiana. After the parties conducted discovery, motions for summary judgment were filed by each party. On November 26, 2002, 4-Mali filed its motion for summary judgment. On December 13, 2002, Bankers filed its opposition to 4-Mali's motion for summary judgment. Then, on January 6, 2003, Bankers filed its own motion for summary judgment, and 4-Mali filed its memorandum in opposition on January 21, 2003. In response, the district court consolidated the motions for summary judgment for consideration without oral argument.

On April 28, 2003, the United States District Court for the Western District of Louisiana rendered judgment in favor of Bankers granting its motion for summary judgment and

denying 4-Mali's motion for summary judgment. (Petition for Writ, App. 1a) Further, the Court entered a memorandum accompanying the judgment setting forth the reasons for judgment. (Petition for Writ, App. 3a) Petitioner 4-Mali then appealed the district court's ruling to the United States Fifth Circuit Court of Appeals, submitting its appellant's brief on June 3, 2003. Bankers submitted its appellee's brief on July 21, 2003. On December 11, 2003, the United States Fifth Circuit rendered its *per curium* decision affirming the trial court's grant of Bankers' motion for summary judgment. (Petition for Writ, App. 16a) Subsequently, 4-Mali petitioned for rehearing to the U.S. Fifth Circuit. The U.S. Fifth Circuit denied the Petition for Rehearing on January 14, 2004. (Petition for Writ, App. 20a) Subsequently, 4-Mali has filed its Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with any decision of this Court. Indeed, the lower court's decision is predicated upon this Court's holdings involving the Appropriations Clause of the U.S. Constitution. As U.S. Treasury funds are used to directly pay flood claims, strict compliance with the terms of the SFIP and provisions of the NFIP is required by insured and insurer alike. Seven appellate circuits have addressed the issue of whether the failure of an insured to submit a timely, signed and sworn proof of loss statement for flood damages is a bar to recovery. All seven are unanimous: *no proof of loss = no payment*! As for the coverage issue, respectfully it should not be addressed as it does not become viable until Petitioner meets the conditions precedent for presentment of its claim.

I. The is No Circuit Split on the Question Presented regarding the requirement of a Proof of Loss Statement (Petitioner's Issue Number Two)

First, and foremost, this very issue has been reviewed by seven appellate courts, and all seven have held that failure to meet the conditions precedent for a flood claim, *i.e.*, submitting a signed and sworn proof of loss statement for the claimed damages within 60 days of the flood loss, is fatal. In fact the U.S. Fifth Circuit summed it up as follows:

> As the provisions of an insurance policy issued pursuant to a federal program must be strictly construed and enforced, [FN4] we hold that an insured's failure to provide a complete, sworn proof of loss statement, as required by the flood insurance policy, relieves the federal insurer's obligation to pay what otherwise might be a valid claim.
>
> FN4. *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947).

Gowland v. Aetna, 143 F.3d 951, 954 (5th Cir. 1998). The six other appellate circuits to rule on this exact issue are as follows:

> *Phelps v. FEMA*, 785 F.2d 13, 19 (1st Cir. 1986)
>
> *Dawkins v. Witt*, 318 F.3d 606, 612 (4th Cir. 2003)
>
> *Neuser v. Hocker*, 246 F.3d 508, 511-12 (6th Cir. 2001)
>
> *Mancini v. Redland Ins. Co.*, 248 F.3d 729, 735 (8th Cir. 2001)

Flick v. Liberty Mutual Fire Ins. Co., 205 F.3d 386, 395 (9th Cir. 2000), *cert. denied* 531 U.S. 927 (2000)

Sanz v. U.S. Security Ins. Co., 328 F.3d 1314, 1319 (11th Cir. 2003)

Each and every decision is the same. Failure by an insured to submit a signed and sworn proof of loss statement is a bar to recovery. As will be explained below, the NFIP's viability is based upon the necessity of uniformity of decision. An examination of each of these individual appellate decisions reaffirms the theme of having a uniform national rule. The appellate decisions are based upon this Court's holdings in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (hereafter "*Merrill*"); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) ("*OPM v. Richmond*"); and *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). Moreover, with the exception of *Phelps*, *supra*, the appellate decisions are based upon this Court's decision in *OPM v. Richmond*, 496 U.S. 414 (1990).

Respondent, in candor to the Court, advises the Court that in 1982, the U.S. Seventh Circuit ruled that the proof of loss requirement could not be strictly enforced by the FEMA. *Meister Bros. Inc. v. Macy, Dir. of FEMA*, 674 F.2d 1174, 1177 (7th Cir. 1982). Notably, even that court held that its decision was limited "holding to the facts of this case." *Id.* Further, it was during this year that the language of the SFIP was changed to prevent the very result in *Meister Bros.*, *supra*. Lastly, this case pre-dates this Court's 1990 holding in *OPM v. Richmond*, *supra*. For these reasons, the Seventh Circuit's decision in *Meister Bros. Inc.*, *supra*, should be accorded no weight whatsoever.

Given that the appellate circuits have uniformly held that a proof of loss statement is a condition precedent for presentment of a flood claim, and that failure to submit same by the insured is a bar to recovery, the instant Petition for Writ should be denied.

II. Structure and History of the National Flood Insurance Program

To assist the Court in understanding the necessity of the proof of loss requirement, Bankers submits the following structure and history of the NFIP for the Court's review.

The National Flood Insurance Program was established by Congress in 1968 pursuant to the National Flood Insurance Act ("NFIA").[1] The NFIP is a federally-subsidized program which provides flood insurance *at below actuarial rates*.[2] (It is thus *designed* to lose money and to be a burden on the U.S. Taxpayer.[3]) Congress created the program because of the unavailability of flood insurance from private insurance companies, who were unable to write flood insurance policies on an economically-feasible basis.[4] Private insurers could not write flood insurance economically because "the public was not interested in purchasing flood insurance."[5]

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1. 42 U.S.C. § 4001, *et seq*.

2. *See Van Holt v. Liberty Mutual Ins. Co.*, 163 F.3d 161, 165 n.2 (3d Cir. 1998); *Gowland v. Aetna*, 143 F.3d 951, 953 (5th Cir. 1998); *Wagner v. Director, FEMA*, 847 F.2d 515, 517 (9th Cir. 1988).

3. Understand, however, that without the NFIP, the taxpayers' annual bill for federally financed flood related disaster relief would be *far* higher. 42 U.S.C. § § 4001 and 4002. *Till*, *infra*.

4. *Id*.

5. *Flick v. Liberty Mutual Fire Ins. Co.*, 205 F.3d 386, 387 (9th Cir. 2000), *cert. denied*, 531 U.S. 927 (2000).

Congress created the program to accomplish two objectives: (1) provide property owners with economically feasible flood insurance otherwise unavailable; and (2) to require that new construction in flood prone areas be located and built in a manner that would reduce loss of life and property.[6] As held by the U.S. Fifth Circuit, *Till v. Unifirst Fed. Savings & Loan Assoc.*, 653 F.2d 152, 159 (5th Cir. 1981),[7] protection of the federal fisc (the U.S. Treasury) was "the principal purpose" for why the Program was created:

> [T]he principal purpose in enacting the Program was to reduce, by implementation of adequate land use controls and flood insurance, the massive burden on the federal fisc of the ever-increasing federal flood disaster assistance.

Initially, the Program operated and was administered primarily through the National Flood Insurers Association, an unincorporated pool of private insurers, under the supervision of and with financial support from the Department of Housing and Urban Development ("HUD").[8] The Association issued and serviced individual policies of flood insurance, processed claims for losses and accepted responsibility for the defense of legal actions brought by policyholders under these agreements until December 31, 1977.

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6. H.R. Rep. No. 786, 90th Congress, 2d Session (1967); S. Rep. No. 1123, 90th Congress, 1st Session (1967).

7. *See also* the "Congressional findings and declaration of purpose" found at 42 U.S.C. § § 4001 and 4002.

8. *Van Holt*, *supra*; *Wagner*, *supra*; *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946; 42 U.S.C. § 4041.

Some five years after the NFIP was established, Congress enacted the Flood Disaster Protection Act of 1973. The purpose of this enactment was as follows:

> The availability of subsidized flood insurance under the National Flood Insurance Act of 1968 did not, by itself, provide sufficient incentive to attract extensive local community enrollment in the Program.

Texas Landowners Rights Assoc. v. Harris 453 F. Supp. 1025, 1027 (D.C. 1978), *affirmed*, 598 F.2d 311 (D.C. Cir. 1979), *cert. denied*, 440 U.S. 946 (1979).

Texas Landowners explains that Congress passed the 1973 legislation to further its goals for the NFIP. The Judge in *Texas Landowners* explained that the original Act and the 1973 Amendment created "a carrot and a stick" federal program. *Id.* at 1030. *Texas Landowners* represents a critical foundation for all subsequent judicial interpretation of the NFIP *because* it establishes that: (a) insurance is just one half of the equation of the NFIP; and (b) *all* judicial analysis should seek to further Congress' goals and intentions for this important and multifaceted federal program.

On January 1, 1978, pursuant to 42 U.S.C. § 4071, the Secretary of HUD terminated that "Arrangement" and assumed the administration of the Program.[9] "HUD assumed full control of the program with the intention of retaining, to the full extent practicable, the services of private insurers as 'fiscal agents' of the United States."[10] Also, during 1978, the original Fifth Circuit issued its decision in the landmark NFIP

9. 42 Fed. Reg. 25701.

10. *Flick*, 205 F.3d at 388-89.

case of *West*, *supra*. In *West*, 573 F.2d at 880-81, the Fifth Circuit based its choice of law ruling upon the following foundational principles which still govern all Program jurisprudence today:

> Congress has undertaken to regulate the claims adjustment process and judicial review thereof, and nowhere in these statutory sections or in the regulations implementing them, 24 C.F.R. § 1912.21, 1912.22 (1977), is there any mention of use of the statutory law of the forum state on any issue.
>
> * * *
>
> Since the Flood Insurance Program is a child of Congress, conceived to achieve policies which are national in scope, and since the federal government participates extensively in the Program both in a supervisory capacity and financially, it is clear that the interest in the uniformity of decision present in this case mandates the application of federal law.

Shortly after *West*, on April 1, 1979, via Executive Order, and pursuant to Reorganization Plan No. 3 of 1978,[11] FEMA was made principally responsible for the Program's operation.[12] Subsequent to this switch, the Program began operating financially through the National Flood Insurance Fund established by the Director of FEMA "in the Treasury of the United States."[13] Note, the Treasury's exposure to the

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11. 43 Fed. Reg. 41943.

12. Executive Order 12127; 44 Fed. Reg. 19367.

13. 42 U.S.C. § 4017.

NFIP includes *both* the "cost incurred in the adjustment *and* payment of any claims for flood losses."[14] Under Plan B of the NFIA (under which the Program presently operates), the Director of FEMA carries out the Program through the facilities of the Federal Government.[15]

In 1982, FEMA exercised its rule-making authority to make a number of different changes to Program regulations, as well as to the Standard Flood Insurance Policy. With regard to these rules changes, FEMA made the following announcement within the Federal Register on May 4, 1982:

> SUPPLEMENTARY INFORMATION: On December 30, 1981, FEMA published for comment in the Federal Register (Vol. 46, p. 63085) a proposed rule containing revisions to the SFIP which were intended to support the major FEMA goals of, in the near term, attaining greater effectiveness in the operation of the NFIP, and, for the longer term, an enhanced level of fiscal self sufficiency in terms of reductions in the cost of the Program. Thus, both risk management and cost containment are being achieved through the addition of coverage restrictions aimed at reducing flood losses and lost payments. (Federal Register, Vol. 47, p. 19138)

Among the said rules changes, was the inclusion of what is now Article 8(O)(6) of the SFIP (44 C.F.R., Pt. 61, App. A(2) (1999 edition)), which reads as follows:

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14. 42 U.S.C. § 4017(d). The Federal Government – not any of the States – pays for the adjustment of NFIP claims.

15. 42 U.S.C. § 4071(a).

> 6. The insurance adjuster whom the Insurer hires to investigate the claim may furnish the Insured with a proof of loss form, and she and or he may help the Insured to complete it. However, this is a matter of courtesy only, and the Insured must still send the Insurer a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help the Insured complete it. In completing the proof of loss, the Insured must use its own judgment concerning the amount of loss and the justification for that amount.
>
> The adjuster is not authorized to approve or disapprove claims or tell the Insured whether the claim will be approved by the Insurer.

This change in the SFIP is pertinent to the case at bar, as Petitioner has did not submit a signed and sworn proof of loss statement for the damages claimed in the lawsuit.

As to this specific provision of the SFIP, the U.S. Ninth Circuit explained in *Wagner* that this provision "candidly warns potential claimants not to rely on FEMA's assistance in complying with the proof of loss requirement." 847 F.2d at 520. Accordingly, and as a matter of federal law, FEMA exercised the rule-making authority granted it by Congress to bar flood insurance claimants from making any claim that it was the insurer's fault that a proof of loss was not filed in compliance with the conditions precedents section of the SFIP. Moreover, because of this specific rules change, all prior case law indicating that FEMA could be estopped from enforcing the proof of loss requirement because of acts or omissions made by an adjuster is no longer good law.[16]

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16. This would include *Meister Bros. v. Macy*, 674 F.2d 1174 (7th Cir. 1982); *Dempsey v. Dir. of FEMA*, 549 F. Supp 1334 (E.D.

(Cont'd)

In light of what is now Article 8(O)(6) of the SFIP, none of those decisions remain good law today. *See OPM v. Richmond, supra*, which reaffirmed the underpinnings of this Court's 1947 decision in *Merrill, supra*.

In 1983, two events occurred which are of special importance to the development of the NFIP: 1) Congress amended both NFIP jurisdictional statutes, 42 U.S.C. §§ 4053 and 4072, to add the words "original exclusive" in front of the word "jurisdiction," and 2) FEMA exercised its authority under 42 U.S.C. § 4071 to create the Write-Your-Own Program. *See* 42 U.S.C. § 4071(a); 44 C.F.R. § 62.23; and 48 Fed. Reg. 46, 789 (1983). In doing so, the Director exercised his statutory authority to utilize federal employees and/or private "insurance companies and other insurers, insurance agents and brokers, and insurance adjustment organizations, *as fiscal agents of the United States*."[17] Thus, acting under direct Congressional authority, FEMA by regulation[18] provided for marketing and claims adjustment of the SFIP[19] by private insurers operating as "Write-Your-

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Ark. 1982), and *Del Boring Tire Serv. v. FEMA*, 496 F. Supp. 616 (W.D. Pa. 1980). Note: The author of *Del Boring Tire Service* is the same judge who later penned *Brookville Mining v. Selective*, 74 F. Supp. 2d 477 (W.D. Pa. 1999), which repudiated the holding in *Del Boring Tire Service*.

17. 42 U.S.C. § 4071(a)(1). Emphasis added in text.

18. 42 U.S.C. § § 4013(a) and 4019.

19. Three SFIPs have been promulgated by FEMA and set forth in the Appendices of 44 C.F.R. Part 61: App. A(1) - the Dwelling Form, App. A(2) - the General Property Form, and App. A(3) - the Residential Condominium Building Association Policy.

Own" companies, at U.S. Treasury expense.[20] Accordingly, as was held in *Gowland, by statute* [42 U.S.C. § 4071(a)(1)], "these companies are fiscal agents of the United States." 143 F.3d at 953. Today, "these companies" write over 90% of all SFIPs in the country. For this reason, a ruling as to any WYO company is a ruling as to the *entire* Program. In addition, because of these two events occurring in 1983, any case law relating to *jurisdiction* to hear NFIP cases decided *prior to* 1983 is no longer relevant.[21] *See Flick, supra*; *Van Holt, supra*.

Since 1983, the WYO Program companies have issued SFIPs in their names[22] collecting premiums in segregated accounts from which they pay claims and make necessary refunds under those policies.[23] Premiums collected from policy holders by the WYO Program companies are, after deduction of the companies' fees and administrative costs, deposited in the National Flood Insurance Fund in the United States Treasury.[24] Premiums are federal funds from the moment they are collected, with interest earned thereon belonging to the United States.[25] WYO Program companies pay claims and make refunds by drawing on FEMA letters of credit from the U.S. Treasury.[26]

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20. 44 C.F.R. § 62.23.

21. Actually, any case law regarding the NFIP issued prior to the Supreme Court's 1990 decision of *OPM v. Richmond, supra*, which is inconsistent with that decision, is most likely no longer good law.

22. 44 C.F.R. § § 61.13(f), 62.23(a).

23. 44 C.F.R. Pt. 62, App. A, Arts. II(E), III(D), III(E).

24. 42 U.S.C. § 4017(d).

25. 44 C.F.R. Pt. 62, App. A, Art VII, B.

26. *See* 44 C.F.R. Pt. 62, App. A. Art. IV.

From an *operational* perspective, federal law provides (because it is federal funds which are at stake) that no provision of an SFIP may be altered, varied, or waived other than by the express written consent of the Federal Insurance Administrator.[27] All SFIPs contain this exact same express prohibition against waiver.[28] As such, the WYO Program companies may not alter the terms of the SFIP as dictated by FEMA. Consequently, as held in *Gowland*, all WYO carriers are bound by federal law to "strictly construe and enforce" all SFIP provisions. 143 F.3d at 953. Thus, the WYO carriers *cannot* simply *decline* to strictly enforce federal law in the handling of NFIP claims. To do so would be to violate federal law, perhaps even criminally. *OPM v. Richmond*, *supra*.

There is also a second reason *why* WYO carriers are forbidden from waiving Program rules. As was discussed in *Texas Landowners*, 453 F. Supp. at 1030, the NFIP is a "carrot and stick" federal program. The insurance (carrot) part of the Program is found at 44 C.F.R. Part 61; however, the flood plain management zoning regulations (the stick) are found at 44 C.F.R. Part 60. Unlike with a private insurance policy, the flood policy is designed to promote FEMA's goals of saving both lives and property through changing the way people build their homes in flood-prone areas. In the NFIP, FEMA is using both zoning *and* insurance *together* to accomplish the objectives of Congress for the Program. Accordingly, since over 90% of all flood policies are now written by the WYO Program carriers, it is obviously critical to FEMA's mission that the carriers not defy FEMA's rules, and, that the Courts uphold the rule of law that the carriers

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27. 44 C.F.R. § § 61.4(b), 61.13(d), 61.13(e), 62.23(c), and 62.23(d); *Gowland*, *supra*.

28. 44 C.F.R. Pt. 61, App. A(2) Art. 8(D).

must strictly adhere to FEMA's rules. In this regard, and as held in both the *Gowland* and *Flick* decisions, FEMA has put in place regulations pursuant to direct statutory authority that *only* it may waive Program rules.

In 1998 and 1999, the FEMA Office of General Counsel, acting with the U.S. Department of Justice and the U.S. Solicitor General, intervened into three different WYO Program cases, before three different U.S. Appellate Circuits. These efforts resulted in decisions of the Third, Fifth, and Ninth Circuits, respectively in *Van Holt* (on rehearing), *supra*, in *Gowland*, *supra*, and in *McHugh v. U.S.A.A.*, 164 F.3d 451 (9th Cir. 1999) (on rehearing). The purpose of these efforts was to restore uniformity of decision. Perhaps of most importance from the said three cases, is the following passage found in the *Van Holt* rehearing decision, 163 F.3d at 166-67:

> As the United States argues, § 4072 provides subject-matter jurisdiction for an insured's suits against a WYO arising out of a disputed flood insurance claim though the plain text appears to restrict the reach of § 4072 to suits against FEMA. For several reasons, a suit against a WYO company is the functional equivalent of a suit against FEMA. First, a WYO company is a fiscal agent of the United States. 42 U.S.C. § 4071(a)(1). Second, FEMA regulations require a WYO company to defend claims but assure that FEMA will reimburse the WYO for defense costs. 44 C.F.R. § 62.23(i)(6). Third, an insured's flood insurance claims are ultimately paid by FEMA. After a WYO company depletes its net premium income, FEMA reimburses the company for the company's claims payments. 44 C.F.R. Pt. 62,

> App. A, Art. IV(A). When a WYO company's proceeds from insurance premiums exceeds its current expenditures, it must pay the excess proceeds to the FIA. 44 C.F.R. Pt. 62, App. A, Art. VII(B). Although a WYO company collects premiums and disburses claims, only FEMA bears the risk under the flood insurance program. Thus, a lawsuit against a WYO company is, in reality, a suit against FEMA. Cf. Gowland, 143 F.3d at 954-55 (refusing to estop WYO company due to relationship between company and FEMA).

In closing, please note that the stakes are enormous – currently over *$400 billion* worth of federal flood insurance is in force, spread over four million policies. Without "uniformity,"[29] the viability of such an enormous federal program is questionable.[30] As was noted by the Ninth Circuit in *Flick*, there is a "compelling interest" in assuring uniformity of decision in cases involving the NFIP. 205 F.3d at 390. Accordingly, it is irrefutable that the NFIP is a creation of the U.S. Congress, designed to be regulated by FEMA, interpreted exclusively by the federal courts, in such a manner as to create uniform national rules, such as the proof of loss requirement.

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29. *See West*, 573 F.2d at 881, regarding the importance of uniformity of decisions.

30. Note that Congress has already declared that "Availability of funds [is] dependent on future appropriation acts." 42 U.S.C. § 4017(f).

III. No Proof of Loss Statement = No Payment

As a foundational point, flood claims presented under an SFIP are paid with U.S. Treasury funds. 44 C.F.R. Pt. 62, App. A, Arts. II and III; *see also Gowland*, 143 F.3d at 955. As discussed in *Flick*, *supra*, the Appropriations Clause of the Constitution controls the payment of such claims, and it requires strict interpretation of the SFIP's provisions and compliance thereof.

The SFIP states that no suit shall be sustainable "unless all the requirements of this policy have been complied with." 44 C.F.R. Pt. 61, App. A(2), Art. 8(T). The SFIP sets forth in detail the requirements for presenting a flood claim at Article 8(O):

Should a flood loss occur to the insured property, the Insured must:

> 1. Notify the Insurer in writing as soon as practicable;
>
> 2. As soon as reasonably possible, separate the damaged and undamaged property, putting it in the best possible order so that the Insurer may examine it; and
>
> 3. Within 60 days after the loss, send the Insurer a proof of loss, which is the Insured's statement as to the amount it is claiming under the policy signed and sworn to by the Insured and furnishing the following information:
>
> a. The date and time of the loss;
>
> b. A brief explanation of how the loss happened;

c. The Insured's interest in the property damaged (for example, "owner") and the interest, if any, of others in the damaged property;

d. The actual cash value of each damaged item of insured property and the amount of damages sustained;

e. Names of mortgagees or anyone else having a lien, charge or claim against the insured property;

f. Details as to any other contracts of insurance coverage the property, whether valid or not;

g. Details of any changes in ownership, use, occupancy, location or possession of the insured property since the policy was issued;

h. Details as to who occupied any insured building at the time of loss and for what purpose; and

i. The amount the Insured claims is due under this policy to cover the loss, including statements concerning:

(1) The limits of coverage stated in the policy; and

(2) The cost to repair or replace the damaged property (whichever costs less).

In the present matter, Petitioner clearly admits that it did not submit a signed and sworn proof loss statement for the

removal and resetting of the lessees' shelving and contents in order to effect repairs to the floor of the insured building.

Petitioner argues that Bankers knew about the claim for the cost of removal and resetting of the shelving and contents, and that this should be sufficient. It is not. Indeed, Bankers was aware of this claim, as it contacted the NFIP Bureau and Statistical Agent for interpretation of coverage under the SFIP. (*See* Petition for Writ, App. 32a) The NFIP Bureau and Statistical Agent determined that coverage was not afforded for such claims. Irrespective of Bankers' knowledge, the terms of the SFIP are clear – the insured must submit a signed and sworn proof of loss statement within 60 days of the flood loss. All of the appellate circuit decisions require strict compliance with this provision of the SFIP. In the case at bar, 4-Mali simply failed to submit a proof of loss statement for these damages.

Instead, Petitioner misapplies the case of *S.A. Burns v. FEMA*, 84 F. Supp. 2d 839 (S.D. Tex. 2000) to the facts at bar. The *Burns* case involved a different condition precedent than the proof of loss requirement. In *Burns*, the issue was over 44 C.F.R. Pt. 61, App. A(1), Article 9(J)(5).[31] 84 F.Supp.2d at 841. Article 9(J)(5) requires that the insured "Document the loss with all bills, receipts, and related documents for the amount being claimed." What Article 9(J)(5) does *not* require is the strict 60 day time period in which to submit the documentation. This was so held by *Burns*. *Id.* at 847. Notably, *Burns* specifically noted that there was ample authority that the proof of loss statement must be submitted within 60 days. *Id.* at 845. The court then stated

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31. This was a homeowners policy, and the policy at issue herein has an exact parallel provision at 44 C.F.R. Pt. 61, App. A(2), Art. 8(O)(5).

that FEMA was not complaining about the proof of loss requirement but the documentation clause. *Id.* Petitioner has attempted to meld the two distinct, separate clauses and requirements into one, and then create an amorphous proof of loss. This will not suffice when U.S. Treasury funds are at stake and the Appropriations Clause commands that all payments be in conformity with the requirements set forth by Congress. *See Flick*, *supra* discussing the importance of the Appropriations Clause.

Next, Petitioner presents a unique argument:

> While Bankers argues that an "estimate" is not a "Proof of Loss" Statement, no argument has been made that the estimates were not attached to both the "First Partial" and the "2nd Partial" Proofs of Loss submitted by 4-Mali.

(Petition for Writ, p. 16). It is true that Bankers argued that "estimates" are not proofs of loss in its motion for summary judgment before the district court. The district court noted that 4-Mali submitted the estimates. (Petition for Writ, App. 8a). Yet, the district court found that 4-Mali had not submitted a proof of loss. (Petition for Writ, App. 11a). It logically follows that an "estimate" is not a proof of loss statement.

The U.S. Eighth Circuit in *Mancini*, 248 F.3d at 734-35, went through a detailed analysis of the purpose of the proof of loss requirement and the necessity of complying with each term within the proof of loss statement. Indeed, substantial compliance and/or failure to swear under oath to an exact amount does not meet the proof of loss requirement. *Id.* For guidance, the *Mancini* court looked to this Court's holding in *Merrill*, 332 U.S. at 385, (stating that "the duty of all courts

to observe the conditions defined by Congress for charging the public treasury" imposes on citizens a corresponding duty to "'turn square corners when they deal with the Government'"). *Id.* at 734. Upon this premise, the Eighth Circuit affirmed that a complete, signed and sworn proof of loss statement is necessary for presentment of a flood claim. *Id.* at 735.

In the case at bar, admittedly, an estimate for the removal and resetting of the shelving and contents was attached to the proof of loss statements submitted to Bankers. However, the estimate was not signed or notarized, nor did it set forth the list of required information found at 44 C.F.R. Pt. 61, App. A(2), Art. 8(O)(3)(b), (c), (e) through (h). Hence, the estimate did not meet the requirements for a proof of loss statement, as per *Mancini*, 248 F.3d at 734-35, which is in accord with the *Merrill*, *supra* holding by this Court.

For all of these reasons, Respondent urges that the Petition for Writ be denied. Further, Respondent contends that because Petitioner has failed to meet the conditions precedent for presentment of its flood claim by failing to submit a proof of loss statement, addressing the Petitioner's First Issue of whether coverage is afforded under the SFIP is not necessary nor appropriate.

IV. No Coverage for Removal and Resetting the Lessees' Shelving and Contents Under the Owner's Building SFIP (Petitioner's Issue Number One)

Bankers contends that the Court need not address the issue of coverage because 4-Mali has not met the conditions precedent for presentment of the flood claim. For the sake of argument, Bankers will address the issue of coverage. Please recall that strict compliance and interpretation of the SFIP is demanded by the Appropriations Clause.

A careful study of the SFIP shows that there are no provisions contained therein for *removal and resetting of lessees' contents and shelving*. The SFIP is not ambiguous as to coverage for this issue – where there is not a clause providing coverage, there is no coverage. It is uncontested that the contents and shelving, that had to be moved in order to repair the floor, were not owned by the named Insured. Rather, they were owned by the Insured's tenants/lessees. No coverage is afforded pursuant to the SFIP. To extend coverage under the SFIP to bailee's good is not a risk contemplated by FEMA.

Petitioner argues that it is not seeking coverage for flood damage to the lessees' contents and shelving, but coverage merely for the removing and resetting of same. However, by removing and resetting property owned by tenants/lessees, the U.S. Treasury *becomes* the insurer for these items.

The SFIP is a policy of insurance that is limited in coverage. It was so designed because the NFIP is burden upon the U.S. taxpayers. However, the SFIP simply cannot codify every single scenario for losses that are not to be afforded covered under it. Nonetheless, a review of 44 C.F.R. Pt. 61, App. A(2), Art. 3 is illuminating. It is entitled "Article 3– Losses Not Covered". Therein, the SFIP sets forth several circumstances for which coverage is not afforded at the expense of the U.S. Treasury. For example, Art. 3 states as follows:

> The Insurer only provides coverage for direct physical loss by or from flood which means the following are not covered:
>
> A. Compensation, reimbursement or allowance for:

> 1. Loss of use of the insured property or premises.
>
> 2. Loss of access to the insured property or premises.
>
> 3. Loss of profits.
>
> 4. Loss resulting from interruption of business, profession, or manufacture.
>
> 5. Any additional expenses incurred while the insured building is being repaired or is uninhabitable for any reason.
>
> 6. Any increased cost of repair or reconstruction as a result of any ordinance regulating reconstruction or repair except as provided in Coverage D–Increased Cost of Compliance.
>
> 7. Any other economic loss.

Because the there is no provision within the SFIP regarding *removal and resetting of lessees' contents and shelving*, it is Bankers' position that such costs to the Insured would fall under Art. 3(A)(7) any other economic loss. Thus, Petitioner's claims in the case at bar are not afforded coverage .

However, Bankers attempted to assist 4-Mali with respect to this coverage question. Bankers contacted the NFIP Bureau and Statistical Agent, which is a private corporation set up by regulation to provide resolution of such issues on behalf of FEMA. *See* 44 C.F.R. § 62.23(i)(8). FEMA contracts with Computer Sciences Corporation, a private company, to act

as FEMA's NFIP Bureau and Statistical Agent. Upon Bankers' inquiry, the NFIP Bureau and Statistical Agent Claims Manager put it succinctly regarding the coverage issue:

> Because you insure the building and because the shelves are not permanently installed or owned by your insured, the SFIP you issued will not pay to remove and reinstall them, even though that it is necessary to make building repairs. If the tenants have coverage, the cost would be acceptable under their tenant's policy.

(Petition for Writ, App. 32a). At this point, Bankers was bound to follow the interpretation of coverage, or the lack thereof, made by FEMA's Bureau and Statistical Agent.

Notably, according to FEMA's NFIP Bureau and Statistical Agent, the cost of removing and resetting the lessees' shelving and contents could have been paid under the *tenants'* SFIP for contents coverage. Because tenants had no such policies, there was no coverage. Of last note, Petitioner attempts to bootstrap coverage to its SFIP building policy by arguing that the lease between 4-Mali and the tenants required 4-Mali to pay for repairs to the building structure. It is well established that a state law contract between two private parties cannot burden the U.S. Treasury.

For these reasons, there is no coverage for the cost of removing and resetting the lessees' shelving and contents under the building owner's (4-Mali) SFIP.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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